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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 753.

ALEXANDER BIRNS,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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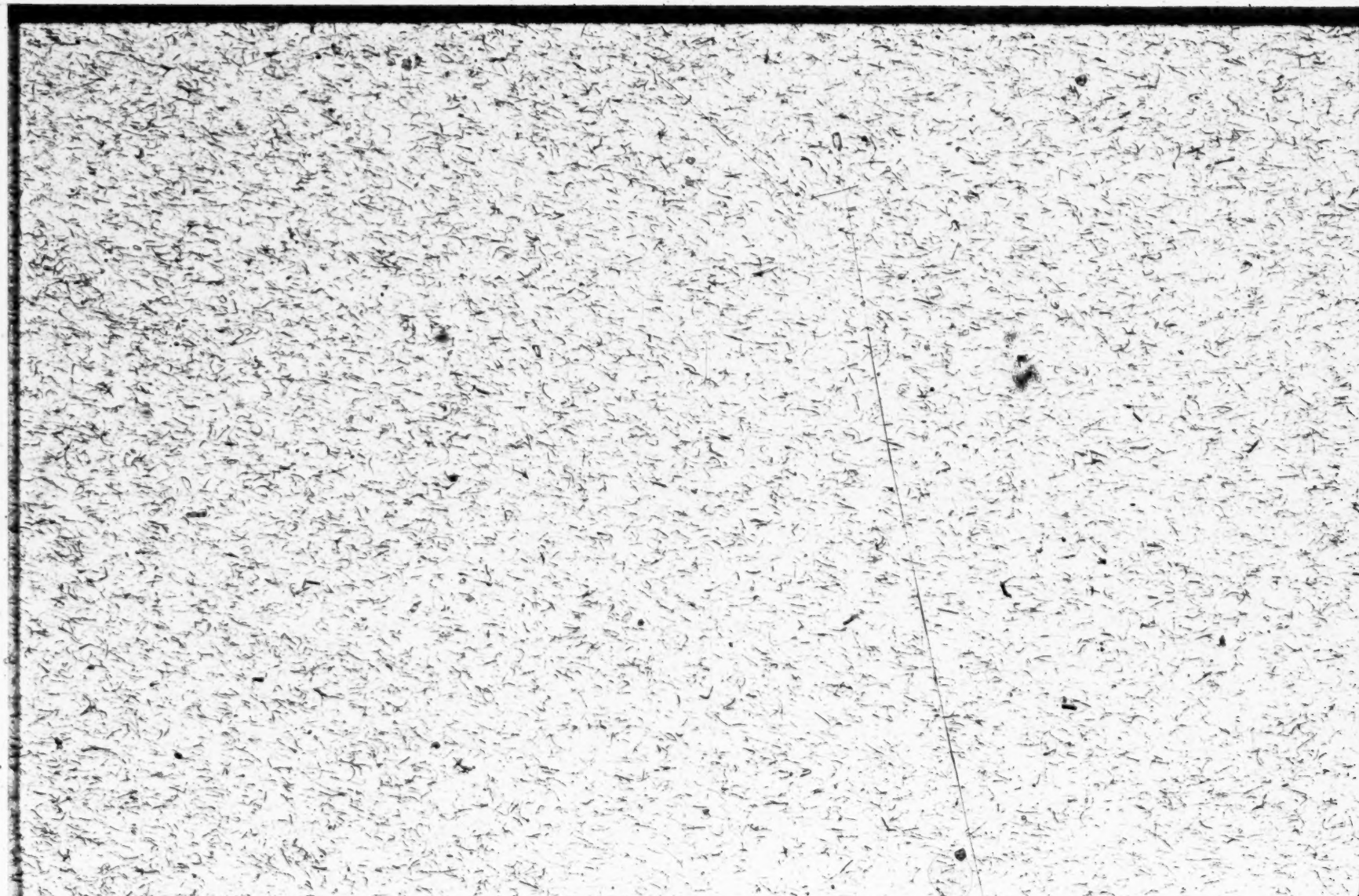

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed in an opinion, 10 Ohio App. 2d 103, 226 N. E. 2d 149. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

QUESTIONS PRESENTED.

The "Questions Presented" in the petition do not accurately present questions raised by the record and by the opinion and judgment of the Court of Appeals. Respondent submits that the subject matter of petitioner's questions would be more properly stated as follows:

I. In a trial for bribery of a police officer and for attempting to influence the officer as a witness in another case, was the petitioner denied a fair trial by the admission of testimony as to evidence that had been suppressed in the other case where petitioner had injected such subject matter into the trial and it is not probative of the guilt of the accused on the bribery and witness tampering charges?

II. When a corroborating witness who listened to the bribe offer said that he actually overheard all that he had testified to overhearing and there is no evidence that his testimony was false and defendant's testimony is not in serious conflict therewith, was the petitioner denied a fair trial by the fact that the jury did not know that the witness had been absent from his listening post for five minutes?

III. Were the petitioner's right of confrontation and right against self-incrimination violated in cross-examination of petitioner?

IV. Where the accused initiated publicity two days after his arrest by voluntarily using the public media to advance his claim that the payment of the money was a gift, was the petitioner denied a fair trial by a newspaper article concerning a federal indictment for perjury in an income tax matter returned while petitioner's trial was in progress?

V. Did the trial court's application of the state standard for determining a motion for a new trial on the ground of newly discovered evidence deprive the petitioner of due process of law where no constitutional error exists and the State's case is supported by the defendant's own testimony?

STATEMENT OF THE CASE.

Alexander Birns was indicted on two counts—bribery and attempt to influence a witness. He was tried to a jury and convicted on both counts, which charged that on or about November 23, 1964 he did

> (1) unlawfully and corruptly offer and give $200.00 to Clarence Bennett, a police officer of the City of Parma, with intent to corrupt and influence Clarence Bennett with respect to the discharge of his official duty as a police officer and/or to influence Clarence Bennett with respect to his action or judgment on matters pending or that might legally come before him as such officer involving said Alexander Birns;
>
> (2) unlawfully and corruptly attempt to influence Clarence Bennett, a witness, in the discharge of his duties as a witness and as an officer of the law in the case of the State of Ohio v. Alexander Birns, et al., No. 80677, with intent thereby to obstruct and impede or attempt to obstruct and impede the due administration of justice.

The defendant filed a motion for a new trial, which the trial court overruled and defendant thereupon perfected an appeal. Some weeks later defendant filed a second motion for a new trial on the ground of newly discovered evidence. After a hearing, the trial court overruled the second motion. Defendant perfected an appeal from that decision also. In both appeals, the judgments of the trial court were affirmed in an opinion reported in 10 Ohio App. 2d 103.

THE EVIDENCE.

Cleveland Police officers saw Alexander Birns, known to them as a clearinghouse operator, carrying clearinghouse paraphernalia, to-wit: a paper bag, such as is commonly used in clearinghouse operations to transport bet slips, into the premises at 5715 Brookpark Road, Parma, Ohio.

On July 23, 1964, the next day, the officers entered the premises of the Vulcan Basement Waterproofing Company, a tenant in the building at 5715 Brookpark Road, and there found Alexander Birns and one Edward Keeling.

Keeling and Birns were immediately arrested by the Parma police and taken to the Parma Police Station. Birns was booked and released on bond. Subsequently, Keeling and Birns were jointly indicted by the Grand Jury of Cuyahoga County, Ohio, for the unlawful establishment and carrying on of a numbers operation, to-wit: clearinghouse in violation of Section 2915.13 of the Ohio Revised Code.

Detective Clarence Bennett of the Parma Police Department was one of the arresting officers. He handled police photography at the time of the arrest and was also present when Birns was first fingerprinted and booked at the Parma Police Station. He testified that about 4 o'clock in the afternoon on July 23, 1964, he participated with other Parma and Cleveland police officers in the arrest for numbers violations of Keeling and Birns. At 5715 Brookpark Road, Birns and Keeling were found in a small room in the office of the Vulcan Waterproofing Company (R. 74).

Bennett, particularly in photography, assisted in gathering the evidence and taking Keeling and Birns to the Parma Police Station (R. 75). When off duty, Bennett

did part-time work as a photographer at the Beef & Bottle Restaurant at 5608 Pearl Road, Parma.

On the evening of November 20, 1964, about five months after the arrest and indictment of Birns for clearing-house violation and before the indictment had been set for trial in the Common Pleas Court of Cuyahoga County, Bennett saw Birns at the Beef & Bottle Restaurant. Bennett testified (R. 78-79):

> "As he started to walk out of the bar with this female I commented to him, 'Hello, Shon,' I said. 'Did you see where we arrested your friend Bucci today?' Bucci was the owner of the Vulcan Waterproofing Company, so on the presumption that they were friends, that is why I made that comment to him, and he made—I believe he said he didn't hear it or read it yet, but he says, 'Let's have a drink,' which we did, and we had conversation.
>
> Q. What was the conversation after you had the drink?
>
> A. It was during the time we were having the drink. He made a comment you would never stop prostitution and gambling, and it was going to go on forever, and we discussed his tax problem.
>
> Q. Tell us what you said to him and what he said to you.
>
> A. It may not be the exact wording, because this is a year ago, and I am not too familiar with the wording of it. I made a comment to him about paying—well, he told me that he owed $154,000 to Uncle Sam in back taxes and that he had offered $25,000 as settlement, which he thought they would take, and I told him at the time he should pay his tax, if he wanted to gamble, buy a tax stamp, and he commented to me about a tax stamp, the government knew where you were at and how much money you were making. We discussed that. Also we discussed that he had—he had told me he had a pipe line into

the Cleveland Police Department and other departments, and he knew everything that was going on.

He also told me that with reference to the gambling case, July 23rd, he was going to beat it on a motion, and he wasn't worried about this, and then he came up with a comment of, 'Who is the handwriting expert that your police department has hired?' At this point I knew of no handwriting expert that was hired by our police department."

Later, Officer Bennett learned from the Chief of the Parma Police Department that in fact the Parma authorities had hired a handwriting expert. The following questions and answers appear in the record (R. 80-81):

"Q. Did you have a further conversation with him during that time?

A. Yes, sir. He asked me how strong of a case we had against him. I told him it was a good case, and he wanted to know what we had against him, and I told him it would be a violation of police ethics to tell him this, and—

Then he told me that the gambling—we got back to the gambling again, and he told me that the Cleveland Press condoned the gambling; in fact, they had two editions of the newspapers, one for the east side, and one for the west side, the one on the east side being where the numbers were being played.

And he told me that he would call me on either Tuesday or Wednesday and he would bring the papers to prove that this was a statement he made about the east and west edition, because I told him I didn't believe this."

It happened that in the course of the evening while Officer Bennett was talking with Birns, Parma Police Chief Szabo came into the restaurant. Officer Bennett excused himself from Birns and went into the men's room and informed the Chief that he was conversing with Birns. The Chief instructed him to "Learn what you can, and be

careful" (R. 82). Officer Bennett returned to Birns and resumed conversation.

On the following Monday, November 23rd, Officer Bennett reported to the police chief the conversation that he had had with Birns on the previous night (R. 83).

At three o'clock on the same afternoon Mr. Birns phoned Officer Bennett at the Parma Police Station and stated that he had the papers and wished to meet the officer again at the Beef & Bottle Restaurant that same night between 8:00 and 8:30 (R. 84). After this telephone conversation Bennett again conferred with the Chief concerning the pending meeting with Birns (R. 84).

After discussing the matter with the Chief, Bennett procured two electronic instruments—a Fargo set and a portable tape recorder (R. 84). In describing the Fargo set the officer testified (R. 84-85):

> "It is a radio transmitter that relays through a receiver. In other words, it is wireless, it has got its own power source, it relays a conversation word for word, which is picked up by the receiver and broadcast, just like a regular radio."

About 6:00 o'clock on the same evening, Detective Eschweiler came to Bennett's home and together the two officers tested the Fargo set.

They then proceeded to the Beef & Bottle Restaurant at the intersection of Ridgefield Road and Pearl Road in the City of Parma. Officer Bennett equipped himself with the transmitting portion of the Fargo set. He testified (R. 88):

> "I had the battery pack and the transistorized unit in my inside coat pocket here (indicating). It ran down through a hole in my shirt to a tie pin microphone. The antenna ran around my back and was looped over a few times and inside this pocket" (indicating).

In testing the equipment, Officer Bennett, wired with the transmitter, went into the restaurant and Detective Eschweiler, equipped with the receiving portion of the Fargo set, remained in his automobile parked outside the restaurant. The officers then checked the Fargo set and ascertained that it was working properly.

A few minutes later, while Officer Bennett, equipped with the Fargo set, was sitting at the bar in the restaurant Birns came into the restaurant. The following question and answer appear in the testimony (R. 89):

> "Q. Tell us what happened after he came in.
>
> A. He is carrying several newspapers. He came in and sat down next to me. We discussed the newspapers and he showed me where to find the number, and he went on to tell me about the odds are 500 to one, with the last three numbers, and then with variations there are different amounts that are paid, and then the least, I think, was 100 to 1, and if the numbers ran in different sequences there was a different odds."

These newspapers were editions of the "Cleveland Press" and were received into evidence. (Exhibits 1-5 inclusive.) In connection with the newspapers, the following questions and answers appear in the record (R. 92-93):

> "Q. Now, with regard to—since you have this one in your hand, did he tell you how the number was determined?
>
> A. He told me to take the last three numbers of the advance and the declines and the unchanged, and this is what determines the number that those people play.
>
> Q. What number is that?
>
> A. This particular one, it is 713."

Birns told the officer that the players pick the numbers by astrology, birth dates, and other weird ways (R. 93).

After showing Officer Bennett how the winning numbers were determined from the stock publications in the Cleveland Press, Birns continued to discuss the subject of gambling. Bennett testified (R. 102):

> "Q. What happened after that?
>
> A. The discussion was still on gambling. He made a comment that if the numbers were knocked off that thousands would be on charity the following day, and also conversation went on again and he started talking about his arrest on Brookpark.
>
> * * *
>
> Q. What was said after that?
>
> A. He told me that a female clerk had overheard his conversation and relayed the information to a woman reporter who in turn relayed that information to Sergeant Dever from Cleveland Police Department, and that is how his arrest came about at 5715 Brookpark."

After this conversation at the bar in the Beef & Bottle Restaurant, Birns suggested that they eat (R. 104). They then moved from the bar to a table along the north wall. After orders for food were placed, Birns *again* asked Bennett for the name of the handwriting expert. That morning the Parma Police Chief had revealed the name of the handwriting expert to Officer Bennett, so that on this second occasion when Birns again asked Bennett for the expert's name Bennett did know his name; however, he did not reveal it to Birns but instead told him that the handwriting was sent to the F. B. I. The officer testified, "That is what the chief told me to tell him" (R. 105).

The following questions and answers appear in the record (R. 105-107):

> "Q. Prior to the time that you were seated as you have indicated for the record and to the Court and

jury, was there any conversation at the bar that you didn't tell us?

A. Yes, sir.

Q. Will you tell us what that conversation was?

A. We talked about—the conversation started to lag so I mentioned that I had my kids photographed the day before and we talked about—he asked me how many kids I had and I told him five and seven/ninths, and he asked my salary and I told him $6800.00 a year, and he told me, 'How can you raise five kids on $6800.00 a year? I have an interest that pays me $20,000.00 a year from an ore company in Canada,' and he mentioned that he had one kid and he had a hard time raising him, and also that he wanted more, and this was what caused marital difficulties with him.

* * *

Q. What conversation did you have there that you haven't mentioned to the jury?

A. Well, after discussing the F. B. I. we ate and the waitress brought the food, and there was some more conversation. I don't recall what it was specifically, but while we were eating Mr. Birns pulled out a wad of bills and put it by my right elbow and I asked him, I says, 'What is this for?' And he says, 'This is a Christmas present for you and your wife and kids.' I told him, 'I know better than that. What do I have to do for it?' And he told me, 'You can be helpful,' and I asked him, 'What way?' And he said, 'Drop a word here and there,' and then he told me 'Ninety percent of the people wheel and deal. Do you want to be a square or do you want to wheel and deal and make a buck.' I asked him again, 'What is the $200'—I fanned the money at this time to see how much was there, because I knew that Eschweiler was out in the car, and I fanned the money and counted twenty tens. I asked him, 'What is this $200 for?' He told me he wanted information on this

case, relative to this case. He told me he was going to beat the case on a motion, on illegal search and seizure, and in the event he didn't he would like to know what was going on."

After Birns asked the officer for information on his pending gambling case from 5715 Brookpark Road, Parma, the men conversed further (R. 109-110):

"Q. What did the defendant say to you and what did you say to him?

A. I told him, 'I got a feeling I am being conned or involved with this $200.00, and I don't want to wind up like Mervin Gould,' and he told me the F. B. I. said that Mervin Gould was the lowest thing around and he deserved to die.

Q. Was there any further conversation about that?

A. Yes, sir. We talked about the F. B. I., too.

Q. All right. What did the defendant say to you and what did you say to him?

A. He told me he wasn't worried about the F. B. I., that if there was anything involving him they would tell him which way to go, and that when big wheels from the F. B. I. came to town, the F. B. I. agents here in Cleveland would come to see old Shon and pick up tickets, box seat tickets, for old Shon had the best tickets in town."

After the money was passed, Bennett gave a pre-arranged signal, whereupon Detective Eschweiler left his automobile and entered the restaurant. At the same time Detective Bennett went into the lavatory. There he met Detective Eschweiler and showed him the bills that he had just received from Birns and instructed Eschweiler to make the arrest. Officer Bennett then returned to the table and sat down with Birns. At that point Detective Eschweiler walked up to the table and spoke to Officer

Bennett in the presence of Birns. Birns then said, "I think it is time I get out of here." He then got his hat and coat. Detective Eschweiler arrested him at the front door (R. 112).

In the meantime a police cruiser had arrived at the front door. Birns was taken to the Parma Police Station. Before entering the police station Birns whispered to Bennett, "Don't tell them nothing, they ain't got nothing on either of us" (R. 114). At about 9:30 p.m. Birns was booked and released on bond.

At the time he was arrested on November 23rd the indictment against him for the violation of the State statute pertaining to clearing house was pending. Bennett testified that when Birns wanted information relative to the pending gambling case, Birns told the officer that he would not jeopardize the officer's position by telling where he got the information.

In their opening statement to the jury defense counsel represented that Detective Bennett indicated to Birns that it was difficult for him to support his five children on a policeman's salary of $6800 per year. On direct examination Officer Bennett testified that it was Birns who brought up the subject. Birns also said that he had difficulty in raising one child on $20,000 a year.

Detective Frank Eschweiler testified that he had been assigned by Chief Szabo of the Parma Police Department to assist Detective Bennett and in consequence thereof at 6:15 p.m. he went to the home of Officer Bennett where they tested the Fargo receiver. At 7:15 p.m. the officers proceeded to the corner of Ridgefield and Pearl Road, Parma. Officer Eschweiler had his personal auto and he parked it on Ridgefield Avenue about 50 feet from the corner of Pearl Road. There they again tested the Fargo equipment. He stated that in testing, Bennett went to

various parts of the restaurant and spoke into the transmitter and that he, Eschweiler, while sitting in his car was able to hear everything that Benntt said.

While he was seated in his car in front of the restaurant Eschweiler observed a black Cadillac enter the parking lot and saw Birns get out of the Cadillac. Birns was carrying newspapers with him at the time. Shortly thereafter Officer Eschweiler commenced receiving conversation through the Fargo receiver. Eschweiler testified (R. 245-249):

"Q. What did you hear after that?

A. There was general conversation about the newspapers and the gambling that took place on the numbers that were on the financial page of the paper.

Q. Well, will you tell us as best you can recall what Detective Bennett said and what the defendant said?

A. Not the exact wording, but the best I can recall I heard Mr. Birns telling Detective Bennett that he had brought the papers that he had talked to him about on a previous occasion, and that he then went on to say that this was an east side edition, this was a west side edition, and that certain items found in the east side were not found in the west side edition, and that this was published by the Cleveland Press.

Q. What did you hear after that?

A. This conversation carried on for a few minutes and then there was a brief lull where there was no direct conversation and then I heard Detective Bennett start to tell Mr. Birns that he had recently had his children photographed.

Q. What happened after that?

A. Mr. Birns asked him how many children he had, and Detective Bennett replied, 'I have five and a fraction of another one.' His wife was expecting at the time. Then I heard Mr. Birns ask Detective Bennett what his salary was as a detective, and Detective

Bennett replied, '$6,800,' and Mr. Birns then stated he didn't know how Detective Bennett could raise five children on $6,800. He said that he received a salary of $20,000 a year from an ore company interest and that he had trouble raising one child on this. He further went on to state that he had always wanted more children, that they had only had one child, and that his wife didn't, that this was a primary cause of their martial (sic) troubles and why they split up.

Q. Did you hear any further conversation after that?

A. Then Mr. Birns asked Detective Bennett what had happened with the handwriting samples that they referred to in their previous meeting, and Detective Bennett replied that these had been sent to the F. B. I., that the F. B. I. was checking the handwriting, and Mr. Birns replied that he was not worried about the F. B. I.

Q. All right. What conversation did you hear after that?

A. After that Mr. Birns suggested to Detective Bennett that they sit down at a table and have some dinner, which apparently they did. Then I heard a waitress ask if they cared to order. I heard Detective Bennett tell the waitress that he would have a steak. Mr. Birns said that he would have the veal cutlet dinner.

Q. What happened after that?

A. After this, apparently the food, from the sound I could hear over the receiver, their food was apparently brought to the table, and the next thing I heard was Detective Bennett say, 'What is this for?' and Mr. Birns replied that was for Christmas presents for his wife and family. Detective Bennett then stated that he didn't believe this and again asked, 'What is this for?' Mr. Birns replied that this was for information. Detective Bennett then said that he couldn't

divulge any information to him. Mr. Birns then stated that 99 percent of the people wheel and deal. He then asked Detective Bennett if he was any different. He asked him if he wanted to be a square or if he wanted to wheel and deal and make a buck. To respond to this Detective Bennett stated, 'You just gave me $200. I have a feeling that I am going to be involved.' Mr. Birns then told him, no, he wasn't going to be involved, that all he wanted was information about his case pending from Parma, and also any information that might come up in the future that would be of value to him. He just wanted him to drop him a word.

Q. What happened after that?

A. Detective Bennett then stated that he was concerned, that he was thinking about what had happened to Mervin Gold and Mr. Birns stated that he didn't have to worry about what had happened to Mervin Gold, that the F. B. I. had even said that Mr. Gold should have been killed a long time ago. He told Detective Bennett, 'You can never be as low as this guy.'

Q. Was there any conversation after that?

A. Yes. Detective Bennett again repeated what did he have to do for this $200, and Mr. Birns said that all he wanted was information concerning this case pending from Parma, and anything that would come up in the future.

Q. What happened after that?

A. After this the conversation then went to the F. B. I. again and Mr. Birns again stated that he was not worried about the F. B. I., that he knew people in the F. B. I., and that when any of the big shots from Washington would arrive in town and the F. B. I. would want tickets for any of the athletic events, such as football games, that they would call old Shon, because he always had the best seats in the stadium, that Shon would provide them with the tickets that

they want, that also if they had anything on his case that was pending from Parma that they would call him, that they would tell him which way to move.

Q. Did you hear any conversation after that?

A. After this Detective Bennett excused himself to go to the washroom, and that was our prearranged signal.

Q. When did you arrange this signal?

A. At Detective Bennett's residence.

Q. All right. Then what happened?

A. As soon as he excused himself from the washroom I turned the receiver off and all the equipment in my vehicle and I went directly across to the restaurant and entered and then went into the washroom."

In the washroom Bennett showed Officer Eschweiler the money that he had received from Birns. When they left the washroom Bennett went back to the table and seated himself with Birns. Eschweiler called the police station from the lobby of the restaurant and requested that a cruiser respond (R. 250). He then went to the table where Birns and Detective Bennett were seated. In the presence of Birns, Bennett asked Eschweiler if he was working nights and at that point Birns immediately said he had better leave right now (R. 250).

Birns started walking toward the cloak room. Officer Eschweiler followed him. After Birns got his hat and coat and walked to the front door, Officer Eschweiler put Birns under arrest. Detective Bennett and Birns were driven to the police station in a police cruiser. Officer Eschweiler followed in his personal automobile.

At the police station the following conversation took place between Officer Eschweiler and Alexander Birns (R. 252):

"Q. Will you tell us what you said to him and what he said to you?

A. Yes. I had the $200 with me. I had taken it from Detective Bennett. I went up to the booking room and I told Mr. Birns that he was under arrest for attempting to bribe a police officer. I told him that I was sure he was aware of his constitutional rights, but however I would advise him that he was entitled to an attorney or phone call. He said he would make a phone call. I asked him if he cared to make any statements concerning the incident. He said he did not want to make any statement, that he did not know what we were talking about, that he had been at the restaurant having dinner alone."

At this time Birns obviously did not know that when he was conversing with Bennett that evening in the restaurant, Bennett had concealed on his person a radio transmitter.

At the time that Officer Eschweiler was in the automobile listening through the Fargo receiver to the conversation between Bennett and Birns, he also had a tape recorder in the automobile.

While he was seated in the car for over an hour and a half, Officer Eschweiler was equipped with only one reel of recording tape. Much of the conversation between Bennett and Birns during this period was "small talk" not related to the bribery. Eschweiler did not attempt to record the "small talk" coming over the Fargo receiver on to the tape recorder. Consequently, having only one reel of tape, he turned the tape recorder off while the "small talk" was going on.

In accordance with routine police regulations, officers Bennett and Eschweiler made a departmental report. They were cross-examined extensively concerning this report. Defense counsel requested the officers' statements and the state not only turned them over to defense counsel for inspection but also offered them into evidence and they were received without objection as state's exhibits 9 and 10.

On the evening of November 20th, 1964, the date of the first meeting between Officer Bennett and the defendant Birns at the Beef & Bottle, the Chief of the Parma Police Department, Francis Szabo, happened to be in the restaurant having dinner with several people. He testified (R. 653):

> "If I recall correctly I was picking up my coat in the checkroom and walking towards the main entrance. I was in the process of leaving when Bennett came towards me, heading toward the washroom."

When Bennett went up to the Chief he talked to him about Birns. On the following Monday, November 23rd, 1964, at the Parma Police Station, Officer Bennett again discussed Birns with the Chief. The Chief ordered Detective Bennett to proceed on the case and to take the transmitter and receiver. He also assigned Detective Eschweiler to work with Detective Bennett because he wanted Eschweiler to keep in touch with Bennett and act as his cover man (R. 654-656).

Sgt. Dever of the Cleveland Police Department, an officer with 19 years' experience in the investigation of rackets and gambling, testified concerning the stock quotations in the Cleveland Press that Birns brought to the Beef & Bottle Restaurant and displayed to Bennett there. The numbers were obtained from an article headed, "What the stocks did today, Thursday, Advances, Declines, Unchanged, Total" (R. 632).

Sgt. Dever participated in the arrest of Birns on the 23rd day of July, 1964 at 5715 Brookpark Road.

Defense Evidence.

The essence of Birns' testimony was that when he learned that Bennett was supporting five children on a salary of $6,500 a year he gave Bennett $200 as a gift. As

to the substance of the conversation surrounding the delivery of the $200, Birns actually corroborated Bennett.

Under cross-examination, he testified (R. 700):

> "So I proceeded further, and we got into the subject of clearinghouse, so I said, 'There is nothing morally wrong about that, neither.' I says, 'As a matter of fact, the newspaper, the stock edition newspaper on the east side in the Belt'—which is the colored belt, the negro belt—'carries the digits, and the same paper that gets out in your area, they don't carry that.'"

Under cross-examination he further admitted that he took the time to go to various parts of the city to get these newspapers and suggested a dinner meeting at the Beef & Bottle, at which time he would hand over these newspapers to Bennett.

Birns admitted that after he gave Bennett the money he told Bennett, "Look, if you can be helpful, O.K" (R. 708).

With reference to publicity, there was testimony by Birns that shortly after he was arrested, of his own volition he made public appearances on television and radio and demanded that the tape recording be played to the public on the television and radio.

He admitted that Bennett had participated in his arrest for the clearinghouse violation.

In answer to a significant point-blank question as to whether he asked Bennett if a handwriting expert had been engaged in connection with his arrest for clearinghouse violation, Birns admitted that he brought up the subject of a handwriting expert with Bennett. He admitted saying to Bennett, "I understand they have a handwriting expert" (R. 747).

He admitted he told Bennett that 90 per cent of the people "wheel and deal." He admitted that Bennett did not ask him for money (R. 839).

With reference to his criminal record, he admitted that he had been convicted of income tax evasion for which he served time in Atlanta; that he had been convicted of auto stealing for which he served time; that he had been convicted of assault and battery of a police officer; that he had been convicted of bribery for which he served time.

When asked on cross-examination how much cash he had with him when he gave Bennett the $200, his answer was that he may have had $400 or $500. On rebuttal, a Parma Police officer testified that when Birns was booked, shortly after his arrest, he had $46.64 on his person.

Birns, under cross-examination, had denied carrying a paper bag into the premises at 5715 Brookpark Road. On rebuttal, Sgt. Dever testified that on July 22nd he *saw* Birns carrying a brown paper bag into the premises at 5715 Brookpark Road where he was subsequently arrested for the clearinghouse violation, that brown paper bags are particularly used to carry clearinghouse bet slips to a clearinghouse, the reason being that the paper bags along with the bet slips stored in the bags are destroyed at the end of three days.

ARGUMENT AND LAW.

I. In a trial for bribery of a police officer and for attempting to influence the officer as a witness in another case, was the petitioner denied a fair trial by the admission of testimony as to evidence that had been suppressed in the other case where petitioner had injected such subject matter into the trial and it is not probative of the guilt of the accused on the bribery and witness tampering charges?

The petitioner claims a constitutional violation because a Common Pleas Judge granted a motion to suppress in the clearinghouse violation case, *State v. Keeling, et al.* The petitioner contends that when the bet slips were suppressed in the clearinghouse case they were necessarily suppressed in this case.

The State did *not* offer the actual bet slips, adding machine tapes or money taken in the clearinghouse arrest into the evidence. The defense itself first injected this subject matter of the material seized in their cross-examination of Officer Bennett. It appears in the record as follows:

> "Q. Mr. Bennett, would it refresh your recollection with respect to when you first saw the materials which were seized on July 23rd, 1964, if I suggested that you saw them before you testified in the grand jury?
>
> A. Wait a minute, I still don't follow you.
>
> (Pending question read.)
>
> A. I saw them the day it was seized." (R. 130-131.)

After the defense had opened the door on the subject, as quoted above, the State followed through on the same subject in re-direct examination (R. 229-230):

"Q. Officer, during your cross-examination I believe reference was made by Mr. Day to materials that were seized at 5715 Brookpark. Do you recall that?

A. Yes, sir.

Q. Now, who was present with you when these materials that Mr. Day alluded to were seized?

A. I think everybody was. Everybody that was there.

Q. All the officers that you mentioned in your previous testimony?

A. I believe so.

Q. Will you tell us what it was that you seized there?

A. Two adding machines, tapes that were used, unused tapes, money, and some white pads, I believe.

Q. Now, when you say tapes were confiscated there, will you explain to us what you have reference to?

A. They were punched on an adding machine.

Q. Did you find anything else there other than the tapes?

A. The money, blank tapes.

Q. And do you have knowledge as to what kind of tapes these were?

A. Only what I was told.

Q. Did you find anything there other than tapes and the adding machines?

A. Yes, sir. Mr. Birns' hat.

Q. And was there anything in his hat?

A. Yes, sir.

Q. What was in his hat?

A. I believe there were tapes, and I am not sure but I think there was money in it also.

Q. All right. I believe you indicated that you took photographs of what you observed and saw there that was seized; is that correct?

A. Yes, sir." (R. 229-230.)

The above-quoted testimony went into the evidence without objection. Sgt. Dever's testimony as to what he saw in the clearinghouse raid was merely cumulative to that of Officer Bennett, whose testimony of what he saw there was received without objection.

Footnote 9 to the majority opinion in *Mapp vs. Ohio*, 367 U. S. 643, states:

> "As is always the case * * *, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."

The essence of the present case is what Birns said and did at the Beef & Bottle when he paid the $200 to Bennett, and this was established in the testimony of the officers that Birns paid $200 to Bennett, a public officer, as a bribe for information from Bennett as to the identity of the State's handwriting expert in the clearinghouse case and for other information pertaining to that case, and that at their two meetings Birns tried to influence Bennett who was a witness in that case. Birns asked Bennett for the name of the handwriting expert, telling Bennett that the evidence in the Brookpark Road case was going to be suppressed on the grounds of illegal search and seizure but he wanted to know the name of the expert in the event the evidence was not suppressed. At the time of the bribe offer Birns obviously did not know how the trial court would rule on a motion to suppress that was yet to be heard.

Since Birns wanted that information irrespective of whether the evidence was going to be suppressed, the fact that it was later suppressed is of no consequence in this case. The important thing is that the indictment was pending at the time. Whether it was subsequently nolled, or Birns acquitted, or the evidence suppressed—none of these

would have any bearing on guilt on the bribery charge. Bribery is an offense against public justice, the gist of the crime being the wrong done to the people by corruption in public service. 11 *C. J. S.* p. 840.

Birns admitted on the witness stand that after talking to Bennett on the night in question he knew that Bennett was one of the arresting officers in the clearinghouse case. Therefore, he had knowledge that Bennett was a witness against him as to what transpired in the clearinghouse case.

There was testimony that Birns was seen carrying a brown paper bag into the building on Brookpark Road where he was subsequently arrested, and that brown paper bags are used to carry clearinghouse bet slips into a clearinghouse office. (*U. S. v. Townsend*, 253 F. 2d 462.) Sgt. Dever, the Cleveland Police Department specialist on the numbers rackets, testified briefly about the technique of its operation.

At their meeting at the Beef & Bottle, Birns gave Bennett a lengthy exposition of the mechanics of clearinghouse operation, even to the extent of promising Bennett that he would make special efforts to locate Cleveland newspapers which published the stock quotations from which the winning clearinghouse numbers were determined in the Negro sections of the city but not in the white sections. Since Birns himself brought up the subject of clearinghouse operations, the jury, so that it would have an intelligent understanding of the entire case, was entitled to a brief explanation of clearinghouse operation as set forth in the testimony of Sgt. Dever.

The opinion of the Court of Appeals disposes of the question as follows:

> "There is no doubt but that Birns brought into the case the matter of his involvement in numbers operations so that evidence as to the manner in which such

a lottery is operated was clearly proper." (10 Ohio App. 2d 103.)

The defendant complained in the Court of Appeals that the court erred in permitting the jury to view the premises at 5715 Brookpark Road, stating that "what occurred at 5715 Brookpark Road was not a material fact."

The second count of the indictment charges Birns with attempting to influence Bennett as a witness in case No. 80677 in the Common Pleas Court, Cuyahoga County, Ohio, wherein Birns was charged with the clearinghouse violation at 5715 Brookpark Road. As one of the arresting officers, Bennett was a witness.

It was part of the State's proof to show where officer Bennett became a witness against Birns.

The court instructed the jury (R. 1026):

> "You were permitted to view the premises where the acts complained of are alleged to have occurred. You were instructed at that time that that was done for the singular purpose alone of enabling you to understand and apply the evidence as you heard it detailed by the witnesses. What you saw on this view is not evidence and you must not so regard it.
>
> The view was for the sole purpose of giving you a sense of relation as would enable you to better understand and apply the evidence."

Section 2945.16 of the Ohio Revised Code provides:

> "When it is proper for the jurors to have a view of the place at which a material fact occurred, the trial court may order them to be conducted in a body, under the charge of the sheriff or other officer, to such place * * *."

The above quoted section does not limit the viewing by such jurors to the place where the crime for which the trial is being held occurred. In *State v. Pigott*, 1 Ohio App. 2d 25, the Court said:

"The object of the jury view as indicated by this statute is to have a view of the place at which a material fact occurred. The case on trial may be one in which any number of material facts occurred in a variety of places. Clearly, it would not be violative of the statute, under such circumstances, that all such places be viewed by the jury. The statute does not contain the language, 'where the crime occurred,' nor is it limited to that construction. * * *"

Petitioner relies on *Silverthorne v. United States*, 251 U. S. 319. In that case, while the defendants were detained in federal custody without authority federal agents went into their office and made a clean sweep of law books, papers and documents. An application was soon made to the district court for the return of what had been unlawfully taken. Photographs were made and copies made of the papers that had been seized. The District Court ordered the return of the originals but subpoenas were issued to produce the originals even though it had been found that the papers had been seized in violation of constitutional rights. In other words, the Government studied the papers that had been unconstitutionally seized and then from that knowledge sought to subpoena them. The Court pointed out that by indirection the Government could not use the knowledge obtained in violation of constitutional rights. Headnote 1 reads:

"1. The knowledge gained by the Federal government's own wrong in seizing papers in violation of the owners' constitutional protection against unlawful searches and seizures cannot be used by the government in a criminal prosecution by serving subpoenas upon such owners to produce the original papers, which it had returned after copies had been made, and by obtaining a court order commanding compliance with such subpoenas."

The *Silverthorne* case is therefore distinguishable on the facts since evidence that had been unlawfully seized formed the sole basis for the Government's case. Here the bet slips were not the basis of the State's case.

II. When a corroborating witness who listened to the bribe offer said that he actually overheard all that he had testified to overhearing and there is no evidence that his testimony was false and defendant's testimony is not in serious conflict therewith, was the petitioner denied a fair trial by the fact that the jury did not know that the witness had been absent from his listening post for five minutes?

This question involves the claim of suppression of evidence that was raised in connection with a motion for a new trial based upon newly discovered evidence, which the defendant filed along with supporting affidavits. The State filed counter-affidavits that were in direct conflict with those filed by defendant. Rather than decide the motion upon the affidavits, the trial court set the motion for hearing. At the hearing evidence was presented by both sides.

Defendant's Evidence.

One Donald E. Hale, 24, testified that at about 8:00 o'clock on the evening of November 23, 1964, he drove his Dodge sedan into the rear end of a Plymouth sedan that was properly parked on Ridgefield Road near Pearl Road in Parma, Ohio. At the time of the collision the parked Plymouth was occupied by Detective Frank Eschweiler of the Parma Police Department. Hale said that following the collision Officer Eschweiler alighted from his car and the two men then stood in the street and discussed the details of the collision for about 30 to 45 minutes (MNT R. 198). He said he was not given a traffic ticket

by any police officer, nor did any other police officer come to the scene (MNT R. 199).

He claimed that as he stood in the street talking with the officer, two of his friends, Martin C. Marcoguiseppi and Adolph Brezovar (MNT R. 202) were standing across the street outside the door of Bearden's Restaurant. He said that sometime later in the first part of December, a police officer came to his home and handed him a summons to appear in the Parma Municipal Court on December 14, 1964.

Under cross-examination Hale said (MNT R. 215) that while drinking at the Guys & Dolls, a bar, one Alvarez overheard him talking with his friends, Marcoguiseppi and Brezovar. Alvarez then phoned the defendant Birns. Hale then talked to Birns on the phone and made arrangements with Birns for a meeting at another bar, the LaScala Lounge Bar. Later Hale and his two friends met with Birns at the LaScala Lounge on four or five occasions.

There he met Birns' counsel, Mr. Day, and also one Russell Henry, a Notary Public who was with Mr. Day. These gentlemen had with them typewritten affidavits that they brought to the meeting.

Mr. Hale and his friends, Mr. Marcoguiseppi and Mr. Brezovar, signed these affidavits at the LaScala Lounge.

State's Exhibit 4B is a Motor Vehicle Accident Report dated March 18, 1965, made and signed by Hale. It was filed with the Bureau of Motor Vehicles, State of Ohio. Hale admitted that in the report he wrote 9:00 p.m. as the time of the accident (MNT R. 253).

After the affidavit was signed, the men visited the bar three more times, remaining there two or three hours as guests of Mr. Birns. Brezovar did not walk across the street to talk to his friend Hale at the place of the collision (MNT R. 355).

State's Evidence.

Detective Frank Eschweiler arrived at the scene at 7:45 p.m. on the night in question in his personal automobile, which he parked on Ridgefield Drive just east of Pearl Road. He was in his car under a special police assignment, listening over an electronic receiver to a conversation between Detective Bennett and Birns when his car was struck from the rear by another vehicle. He stated (MNT R. 486-487):

> "A. As soon as I was struck, I immediately got out of my car, and the driver of the other vehicle that struck me got out of his and walked up to me. And we discussed the accident briefly.
>
> Q. How long were you out of your car at this time?
>
> A. Completely until I reentered?
>
> Q. Yes.
>
> A. At the most, five minutes."

Eschweiler showed Hale his badge and told him that he was a Parma police officer and would have to call the accident in. He then went to a telephone at Bearden's Restaurant and notified the Parma Police Department, where the call was electronically recorded at 9:05 p.m. The collision occurred a few moments before the call (MNT R. 485).

After Eschweiler made the call he returned to his car and told Hale (MNT R. 488):

> "A. At this time, after I made the call, I returned and told him that I had called, and they were sending a police car down, and that he should wait in his car, and I reentered my car and continued on in work that I was originally there for.
>
> Q. Did a police officer respond to your call?
>
> A. Yes, he did.
>
> Q. What police officer was that?

A. Patrolman Gabriel responded.

Q. And do you know about how long it was before he arrived on the scene after you made the call?

A. It was just a short time after that, a few minutes he arrived."

He saw Hale and Patrolman Gabriel walking together toward Gabriel's patrol car (R. 489).

After Eschweiler reentered his car he remained for another ten minutes until he received a prearranged signal from Bennett as to what had taken place in the Beef & Bottle. He testified (R. 490):

"Q. How long did you remain on the scene after Patrolman Gabriel gave your license back?

A. I was there for approximately another 10 minutes, and then I drove across the street to the Beef and Bottle.

Q. And why did you go to the Beef and Bottle at that time?

A. I had received a signal from Detective Bennett with regard to what he was—what had taken place in the Beef and Bottle, and this was a prearranged signal that if I was to hear it I should immediately enter the restaurant, which I did."

On several occasions after the accident Hale told Eschweiler he could not pay for the damages, he did not have any money and there was nothing Eschweiler could do about it (R. 493).

State's Exhibits 5 and 6 were received in the evidence. State's Exhibit 5 is the official report of the Parma Police Department setting forth the time of the accident at 9:05 p.m. State's Exhibit 6 (defendant's Exhibit G) is an official communication dated February 24, 1965 from the State of Ohio, Bureau of Motor Vehicles, to Donald R. Hale, advising Hale that he had been in a motor vehicle accident on November 23, 1964, and that his driver's license would

be suspended unless he submitted evidence of restitution for damages. Hale came to the police department about a week later and agreed to sign a note to cover payment for the damages (R. 505).

The officer was asked (R. 506):

"Q. During the course of the trial in December of 1965, that is Case Number 81317, the State of Ohio versus Alexander Birns, you testified that you heard certain things that were transmitted to you by a device that was on the person of Detective Bennett, is that correct?

A. That is correct.

Q. Did you hear every thing that you testified to in court under oath?

A. Yes, I did."

Under cross-examination Eschweiler said he arrived at the scene between 7:30 and 7:45 p.m. He entered the Beef & Bottle Restaurant between 9:15 and 9:30 p.m. He emphatically denied that he was out of his car talking with Hale for 30 to 45 minutes.

At the Parma police station at 9:05 p.m., police dispatcher Collari ordered Officer Henry Gabriel to the scene of an accident at Ridgefield and Pearl Roads. Officer Gabriel arrived there at 9:10 p.m. After briefly conversing with Patrolman Eschweiler, Gabriel then placed Hale in the rear of the police cruiser. Hale related the details of the accident. Officer Gabriel then issued him a citation (defendant's Exhibit 2). When Gabriel wrote out the citation, four copies were simultaneously made. He handed one of the copies to Hale at the scene. He notified headquarters at 9:24 by radio that he had completed his investigation at the scene and was returning. At 9:45 he was dispatched in his cruiser from the police station to the Beef & Bottle Restaurant, where he picked up Detective

Bennett and Birns and brought them back to the police station. Later in the evening he made out his official accident report (State's Exhibit 5).

State's Exhibit 2, the officer's "Daily Activity Report," was prepared by Officer Gabriel. It disclosed that the number of the traffic ticket he issued to Hale was AA 5946.

He testified that Hale's ticket was the last one he had issued on the night in question. Altogether, he was with Hale for fourteen minutes at the scene.

One Dennis Nicholas was acquainted with Detective Eschweiler. Shortly after 8:30 p.m. on the night in question he left the home of his fiancee and arrived at the vicinity of Bearden's Restaurant at about 8:45 p.m. At this time he briefly spoke to Officer Eschweiler who was seated in his car across from Bearden's Restaurant. At that time there was no damage to Eschweiler's car, nor did he see any other person or automobile in the vicinity of Eschweiler's car.

On December 14, 1965, he was summoned to Parma Municipal Court for a minor traffic violation, where he saw Hale. Hale told him that he also was there for a traffic violation. Hale said that he had collided with a car owned by a Parma police officer and that another police officer had arrived at the scene and placed him under arrest.

At MNT R. 586 the trial court stated:

> "The court would like to briefly state the basis for its ruling. Both Detective Eschweiler and Police Officer Gabriel spoke with candor and frankness. Mr. Eschweiler told us that an accident happened a little after 9:00 o'clock. The police report indicates the accident happened at 9:05. The citation which was issued indicates the accident happened at 9:10. Now,

the city of Parma has an electronic machine, I will call it for lack of a better explanation, and the prosecution presented a tape which was marked and received in evidence, and it shows how Mr. Eschweiler reported the incident at 9:05, Patrolman Callari dispatched Mr. Gabriel at 9:05, and how Mr. Gabriel in turn reported at 9:24 that all was secure. Also, the daily activity report of Mr. Gabriel which is in evidence as an exhibit indicates generally the same information. It is absurd to think that the whole department of police of the city of Parma would cooperate with one policeman or two policemen to fabricate a lie."

The court further stated (R. 587):

"The court has absolutely no reservation that Mr. Gabriel was at the scene of this motor vehicle accident. The court has no reservation whatsoever that Mr. Gabriel issued a ticket to Mr. Hale. The court has no reservation about the propriety of the police report filed by these two officers."

In further discussing the evidence the court said (R. 588):

"Now, with reference to Mr. Hale. This court is of the opinion that the motor vehicle accident report to Columbus speaks for itself. The motor vehicle accident report was marked and received in evidence, and it is written in the hand and over the signature of Mr. Hale, and it tells us that this incident occurred at 9:00 o'clock. For all purposes, that is the same time that Mr. Eschweiler said the accident happened; it is the same time that Mr. Gabriel said the accident happened, give or take a couple of minutes.

"The affidavit that was submitted, changed though it might have been, is very interesting, because read prior to its change it would read as follows: 'Affiant further says that the operator of the aforesaid Plymouth automobile which was parked at the curb

alighted from his car, identified himself as Frank Eschweiler, a Parma detective, and a conversation over and investigation of the accident followed which lasted between 35 and 45 minutes. Affiant further says that another police officer eventually came to the scene,' et cetera.

"The original affidavit prior to its change suggests the very things that Detective Eschweiler and Patrolman Gabriel tell us is the fact."

In addition to claiming that Eschweiler's testimony was impeached, petitioner's counsel, by relying on *Napue v. Illinois*, 360 U. S. 264, infers that Eschweiler testified falsely. In *Napue* a state's witness testified falsely that he had received no promises in consideration of his testimony. The state's attorney knew that this testimony was false. In the present case, Officer Eschweiler testified at the hearing on the motion that he had in fact heard over the electronic receiver everything that he had testified to at the trial. There is no evidence that Eschweiler at any time gave any testimony that he knew was false.

There was no testimony by the defendant as to what was said during this five minute interval. What might have been said by either the defendant or the police officer would be mere speculation.

The issue raised by the motion was: Had the jury known of the accident, would a different result have been obtained? It was the trial judge's finding that if the jury had known of the accident, the jury's verdict would still have been the same. The Court of Appeals affirmed this finding, stating, "The credible evidence on the collision, as shown by the record, clearly supports such result."

Eschweiler did not omit or suppress anything that he actually heard. Here there was no actual suppression of positive evidence, nor employment of false testimony

or fabricated evidence; therefore no constitutional question arises. As pointed out in the opinion of the Court of Appeals, Eschweiler's testimony was corroboratory in character. With the exception of the five minutes that he was out of the car he listened to the conversation between Bennett and Birns for an hour and fifteen minutes, and "the parts of the conversation to which he testified, he had heard over the transmitter."

Birns himself admitted that after giving Bennett the money he told Bennett, "You can be helpful." "Drop a word here and there."

"Helpful" is defined in *Webster's New International Dictionary,* Second Edition, as, "To lend aid or assistance; to contribute strength or means, to avail or be of use; to assist." Certainly in the light of Bennett's participation in the arrest of Birns, the jury had the right to conclude that by "helpful" Birns meant that Bennett should give him information that would be of assistance in overcoming the State's charges in the then pending indictment for the clearinghouse violations.

The opinion of the Court of Appeals points out that the testimony of the petitioner himself is not in serious conflict with that of Bennett, who participated in the conversation with Birns, or that of Eschweiler, who listened over the broadcasting equipment, and quotes defendant's testimony on cross-examination. This testimony led the Appellate Court to the following conclusion:

> "As thus stated by the defendant, it is clear that the State's case is supported by the defendant's own testimony and upon such evidence, the case was correctly submitted to the jury. The absence of Eschweiler from his listening post for five minutes or less, when the conversation covered a period of time from about 8:15 to 9:30 p.m., was not, upon the record as above stated, a factor preventing defendant from

being afforded due process according to law. The motion for a new trial on the ground of newly discovered evidence was, therefore, properly overruled * * *."

III. Were the petitioner's right of confrontation and right against self-incrimination violated in cross examination of petitioner?

The petitioner contends his constitutional rights were violated when the court permitted the prosecution to ask questions which he claims were deliberately designed to force him to invoke the privilege against self-incrimination. Counsel for the State did not put Birns on the witness stand, did not have a statement from him, and when the prosecutor asked the questions on cross-examination he did not know whether Birns would claim the protection of the Fifth Amendment. Neither did the prosecutor know whether Birns' answers would harm the State's case. Surely the State was entitled at least to attempt to cross-examine Birns.

In the cases cited in the petition it was the government that put the witness on the stand knowing that he would refuse to answer on the ground of self-incrimination, thus by subterfuge attempting to get across to the jury information that under the circumstances it was not entitled to elicit from its own witness. Such was not the case here.

IV. Where the accused initiated publicity two days after his arrest by voluntarily using the public media to advance his claim that the payment of the money was a gift, was the petitioner denied a fair trial by a newspaper article concerning a federal indictment for perjury in an income tax matter returned while petitioner's trial was in progress?

Petitioner complains that due process was violated because of extensive publicity attending his trial.

At the hearing on his first motion for a new trial, the defendant subpoenaed and placed on the witness stand representatives of the Cleveland Press, the Cleveland Plain Dealer, the three Cleveland television stations, various radio stations, and also such national communications media as the Associated Press and United Press. Under subpoena duces tecum they brought with them every newspaper publication, television broadcast, and radio script that was published or spoken over their media in connection with the trial of Birns. All these clippings and transcripts are attached to and made part of the record of the hearing on the first motion for a new trial. Under Ohio law, before a jury verdict will be disturbed there must be proof that newspaper articles or television broadcasts affected the verdict. There is no such showing in this case.

On November 23, 1964, Birns handed Bennett $200 at the Beef & Bottle Restaurant in Parma. He was immediately arrested, booked and released on bond by the Parma Police. About a week later, on December 1, 1964, Birns was indicted by the Cuyahoga County Grand Jury. Two days later, on December 3, Birns himself voluntarily took to the air over radio and television stations WKYC and said (Def. Ex. S-8):

Transcript of Shondor Birns' interview, broadcast 12/3/64:

"Birns: He opened up the conversation by making this statement: He says, you know, I have four-and-a-half kids and I'm only making sixty-five hundred dollars a year. To me it sounded like a beg, or whichever way you want to think it is, but to me that's the way it sounded. So I in turn reached in my pocket and I handed him $200.00 and says, look, this is a Christmas gift for your family and kids, so they'll have a nice Christmas. He didn't know what to say at the moment and he took the money. Then, after a minute or two of other conversation, he said, will you excuse me, I have to go to the men's room. I waited about four or five minutes and he finally came back. He took the $200.00, laid it on the table and put his elbow on part of it: I'd say about one-third of part of it and the other three, two-thirds openly on the table, and he asked this question, he says, Shon, he said, tell me what can I do for you for this $200.00. I said there is nothing you can do for me. I said this is for your family and your kids and I would not want you to jeopardize your job. He said, isn't there something I can do for you. I said, no. He says and he goes on further and says, look, isn't there somebody out here that I can do something for you, some people out here, maybe, are doing something that I could give a break to. I says, no, I don't have anybody out here and I don't have any interest out here. And that's the way I left it. I presume he didn't like those answers, if he is setting a trap up, I presume, that is those answers didn't quite jell with him. And a moment later a gentleman stops over to my table and looks at us and stares at us and starts staring at the table, and I looked up and I said, I don't like this; I says, I'm getting out of here and going home. As I got up, went to the checkroom and got my clothes, I was apprehended by the Parma Police. They showed their credentials and said you are under arrest. And that's what happened.

Sciria: What is your reason for attempting to get the tape recording played?

Birns: I am asking for this definitely, because I believe that if they bring it in and expose the tape recording, I don't think the grand jury would ever have indicted me, and what could be better evidence. After all, if you have got a tape recording, they can't deviate from that, and I'm sure that's the best thing that ever happened to me, and I would appreciate if they would bring this tape recording out and expose it, and in that way the statements I am making, I'm sure, could be affirmed. And that's the best thing ever happened to me; as far as I am concerned, if they got a tape recording, that's the best evidence. My word and his word, it's going to be a battle, but if they have the tape recording, I think it could clear the air, and the statement I am making, I'm sure, can be confirmed by the tape recorder, and I don't know of any better evidence than that, and that's what I want."

In the course of their first conversation Birns told Bennett that he had a pipeline to various police departments. If information had actually reached Birns that the State's recording on the tape recorder was not coherent, one could understand why Birns was publicly demanding the tape recording. (Incidentally, by agreement of counsel the tape was received into the evidence as a joint exhibit and was played to the jury.)

In any event the record in this case unequivocally establishes that Birns, from the outset, sought the support of the public media to bolster his defense by placing it before the entire community. Having done this, he is not in a position to complain.

This petitioner, year after year, has been in the public eye in this community. From the content of the television interviews and newspaper clippings in the record,

the impression is given that, far from being prejudiced, he received sympathetic attention.

The newspaper and television media, while the instant case was being tried, did not interpret the testimony or express any opinion or comment upon the guilt or innocence of Birns. Much of the material shown in defendant's exhibits can hardly be termed favorable to the State. For instance:

In a defense exhibit, the following public broadcast over Television Station WJW, Channel 8, appears:

> "* * * Birns denies any bribery attempt—and has told City Camera that he gave Detective Bennett $200 Dollars last November after Bennett had complained that a low police salary prevented him from being able to give his family a nice Christmas."

In Defense Exhibit 68, defense attorney Jack G. Day is quoted in his final argument to the jury:

> " 'Do not convict for past wrongs or what might be future wrongs,' he said. 'We must have justice.'
>
> He asked the jury: 'If Shondor Birns were looking for someone to bribe, would he not look for someone with access to the evidence? Would he choose a crowded restaurant, where both he and Detective Bennett were well known? Would he throw 20 $10 bills on the table in full view of all people if he were planning to bribe?' "

We fail to see how the above quoted publications were in any way prejudicial to Birns.

The defense complains about the newspaper article that a federal indictment against Birns was returned on December 21st, 1965, charging perjury in connection with his income tax. Defense exhibit 1C:

> "U. S. Attorney Merle S. McCurdy said the federal indictment coming near the end of the bribery trial was not intentional and was not designed to

affect the outcome. He said plans to announce the indictment yesterday were made several weeks ago.

McCurdy said he thought the bribery trial would be over by then, but the trial was protracted for several reasons and we had to make the return because of the statute of limitations."

The federal indictment resulted from Birns' trouble with the income tax authorities, not the State of Ohio. At this point it should be recalled that on the night in question Birns told Bennett that the United States Government had an income tax lien against him for $154,000, which he was trying to settle for $25,000.

In order to condition Bennett to accept the $200, Birns went to such extreme lengths as to boast to Bennett that he had "pipelines" to the various police departments, that the F.B.I. had accepted favors from him. He also informed Bennett of the low esteem in which he held the American public. It is singular that in his zeal to "soften up" Bennett, who was a comparative stranger to him, Birns told him about his personal income tax troubles with the Department of Internal Revenue.

Finally, Birns admitted on the witness stand that he had been convicted in federal court of income tax evasion. It is difficult to perceive how Birns could have been prejudiced by announcement of a mere indictment in the light of his own admissions.

In none of the decisions of this Court cited by petitioner did the accused himself aggressively take to the public media to publicize and enlist sympathy for his defense. The exhibits certainly do not disclose massive publicity adverse to Birns, nor intrusion of representatives of the news media into the trial. Here it was Birns who launched his defense through the news media.

V. Did the trial court's application of the state standard for determining a motion for a new trial on the ground of newly discovered evidence deprive the petitioner of due process of law where no constitutional error exists and the State's case is supported by the defendant's own testimony?

The petitioner asserts that the trial court's finding that "the facts as it found them to be if presented to the jury would not within reasonable probability cause the jury to come to a different result," contravenes the standard for harmless error set in *Chapman v. California*, 386 U. S. 18, 35 Law Week 4197. In *Chapman* admittedly there was a violation of a constitutional right in the comment of the prosecutor on the failure of the defendants to testify.

In the present case, as established in the second subject of argument hereinabove, there was no actual suppression of positive evidence, nor employment of false testimony or fabricated evidence; therefore no constitutional question exists in this case. There being no omission or suppression of evidence vital to the accused and therefore no violation of constitutional safeguards, the trial court correctly applied the state standard for determining a motion for new trial on the ground of newly discovered evidence and the petitioner was not thereby deprived of due process.

CONCLUSION.

This case posed only one question: Did Birns give Bennett the money to help Bennett's children at Christmas or did he give the money to learn the name of the handwriting expert and to influence a witness in the pending indictment for clearinghouse violation? The moment Birns admitted giving Bennett the money but claimed it was a gift, then and there any issue of constitutional safeguards was removed. The petitioner had a fair trial before a fair and impartial court and jury and nowhere were any federal constitutional standards either misapprehended or misapplied. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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